

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request for:

AVI O.

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2011090305

DECISION DENYING CLAIMANT'S
APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 12, 2011, in Los Angeles. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Avi O. (Claimant), who was present, was represented by his foster mother; she was assisted by an interpreter.¹

Johanna Arias-Bhatia, Fair Hearing Manager, represented the South Central Los Angeles Regional Center (Service Agency.)

ISSUE

Does Claimant have a developmental disability making him eligible for regional center services?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a four-year-old boy who was referred to the Service Agency for an eligibility evaluation by his social workers.

¹ Initials and family titles are used to protect Claimant and his family's privacy.

2. By a letter dated July 20, 2011, the Service Agency gave written notice of its determination that Claimant does not have any of the five developmental disabilities that would qualify him for regional center services.

3. A Fair Hearing Request was submitted on Claimant's behalf on August 29, 2011, which appealed the Service Agency's denial of eligibility.

The Service Agency's Evaluation of Claimant

4. Claimant was taken away from his biological mother when he was an infant due to abuse and neglect. He has not had any contact with his biological father. Claimant was subsequently placed with his foster parents, with whom he currently resides. In fact, Claimant's foster parents are in the process of adopting him. Claimant has not yet been enrolled in school or begun receiving special education services, for reasons that are not clear.

5. In the process of being placed with his current foster parents, Claimant was evaluated by Dr. John M. Chavez, a psychologist with the Los Angeles County Department of Mental Health. Dr. Chavez learned that Claimant was enrolled in weekly individual psychotherapy, but was not taking medications. Although Dr. Chavez found Claimant's speech to be within normal limits in certain respects, he also found that Claimant's articulation and vocabulary were limited, indicating to him an expressive language disorder. Based on his evaluation, Dr. Chavez diagnosed Claimant with Adjustment Disorder with Mixed Disturbance of Emotion and Conduct, Child Disorder Not Otherwise Specified (NOS), Expressive Language Disorder, and Child Neglect. Dr. Chavez did not make an Axis II diagnosis, meaning he did not diagnose Claimant with mental retardation. Dr. Chavez also recommended that Claimant be referred to the Service Agency "just to make sure there are no underlying medical issues," but indicated that Claimant "may not qualify" for regional center services.

6. An intake assessment was done by Service Coordinator Rosalinda Mata on May 18, 2011. Thereafter, the Service Agency requested and reviewed Claimant's medical and school records, and referred him for a psychological evaluation with Dr. Roberto De Candia, Ph.D.

7. (A) Dr. De Candia conducted a psychological evaluation of Claimant on June 3, 2011. Dr. De Candia conducted a clinical interview of Claimant and his mother, reviewed some records, and administered tests focused on Claimant's intellectual skills, adaptive skills, and the presence of any traits associated with autism. Dr. De Candia felt that Claimant's score on the Childhood Autism Rating Scales- Second Edition (CARS-II) came close to the cut-off for autism but did not actually support a diagnosis of autism. Although Claimant initially appeared distant and withdrawn, Dr. De Candia noticed that Claimant later warmed up to him during the clinical contact. Dr. De Candia concluded that Claimant's behaviors were best described as oppositional and truculent. Moreover, Dr. De Candia did not detect repetitive behaviors commonly associated with autism.

(B) Claimant's performance on intellectual and academic testing was scored in the average and low-average ranges. Dr. De Candia concluded that the testing "clearly rules out the presence of any cognitive delay at this time."

(C) Claimant's foster parents described Claimant to Dr. De Candia in a way suggesting that he may be having visual hallucinations. Claimant was also described as being violent and aggressive toward others, including family and peers, as well as the family's pet. Dr. De Candia provisionally diagnosed Claimant with Psychotic Disorder NOS, which was provisional because he felt Claimant needed to be further evaluated by a psychiatrist. Based on Claimant's demonstrated language delays, Dr. De Candia diagnosed Claimant with Mixed Receptive/Expressive Language Disorder, though he felt it would be prudent for a psychiatrist to also rule out a Bi-Polar Disorder NOS. Dr. De Candia did not make an Axis II diagnosis. He recommended that Claimant receive special education services as soon as practicable, including speech and language therapy, that he continue with his psychological treatment, and that he be reevaluated by a psychologist or psychiatrist in three years in order to review his progress and review the long term validity of his diagnoses.

8. On July 7, 2011, Service Agency staff psychiatrist Ehab Yacoub conducted a psychiatric record review. He felt that Claimant's language disorder was a barrier. Based on how Claimant was described in the records, Dr. Yacoub felt a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD), Impulse Control Disorder, and Mixed Receptive/Expressive Language Disorder were warranted. He felt no Axis II diagnosis was warranted.

9. On July 19, 2011, Service Agency staff conducted an interdisciplinary conference and concluded, after reviewing the above information, that Claimant is not eligible for regional center services, because there is no evidence of autism, mental retardation, cerebral palsy, epilepsy or a fifth category condition.

10. Service Agency staff psychologist Dr. Sandra Watson also testified. She concurs with the interdisciplinary team's conclusion that Claimant is not eligible for services. She added that, in her opinion, Claimant does not exhibit a fifth category condition because he does not function similar to a mentally retarded child, and does not require similar services. For example, she opined that Claimant's cognitive test scores are substantially higher than what she would expect for a person with a major cognitive impairment.

Claimant's Evidence

11. Claimant's foster mother testified. She has approached the Service Agency because Claimant needs services. She has many areas of concern. For example, she describes Claimant as unruly and hyper. He is also aggressive and violent. He hits other children and recently killed the family dog. He destroys property. He has few social skills. Sometimes it is hard to understand him when he speaks. He has a limited vocabulary. He has no safety awareness. He is not yet fully toilet-trained.

12. Mental health issues are still emerging for Claimant, undoubtedly related to the deplorable condition he lived in before being placed with his foster parents. For example, his foster mother testified that Claimant has been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and takes medication for it. An unidentified mental health care specialist is now in the process of evaluating whether Claimant has a bi-polar disorder. He continues with his psycho-therapy. Claimant's foster mother also confirmed that it appears to her that Claimant sees things that are not visible to her. In fact, during the hearing, while Claimant's foster mother was testifying, Claimant stated in Spanish that he was seeing something on the wall or ceiling of the hearing room that disturbed him, which was not visible to others in the room.

LEGAL CONCLUSIONS

Jurisdiction & Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant properly requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. (Factual Findings 1-3.)

2B. With regard to the issue of one's eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (*Id.*, at p. 1137.)

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the Service Agency's. (Factual Findings 1-3.)

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Claimant Did Not Establish that He has a Qualifying Condition

3. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512.)

4. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has a qualifying condition. No expert provider or clinician has diagnosed Claimant with cerebral palsy, epilepsy, autism or mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings*, *supra*, 89 Cal.App.4th at p. 1129.) None of the records submitted indicate that Claimant currently functions or requires treatment similar to a mentally retarded person. The Service Agency's experts have opined that Claimant does not have a qualifying condition. The anecdotal evidence supplied by Claimant's mother does not sufficiently refute the opinions presented by the Service Agency's experts. (Factual Findings 4-12.)

ORDER

Claimant Avi O.'s appeal is denied. The South Central Los Angeles Regional Center's determination that he is not eligible for services is upheld.

DATED: November 14, 2011

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.